

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 99-0130

Use Tax

For Calendar Years 1995, 1996, and 1997

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ISSUE(S)

I. Use Tax – Request for Prospective Treatment

Authority: IC 6-2.1-1-1, IC 6-2.1-1-2-5, IC 6-2.5-3-2, 45 IAC 2.2-4-1, IAC 2.2-5-52

Taxpayer argues it should be required to remit use tax on utilities on a prospective basis.

STATEMENT OF FACTS

Taxpayer sells food for immediate consumption such as sandwiches, french fries, soda pop, ice cream, and cakes and has one location in Indiana. Taxpayer elected to file as an S Corporation on April 17, 1987.

Upon audit it was discovered that Taxpayer was purchasing one hundred percent of its electric and gas utilities exempt from sales tax. Taxpayer states that an auditor from the state reviewed the previous utility study performed by the taxpayer and was given an exemption by the department. There is no verification that an auditor came from the state to review the taxpayer's utility study. The taxpayer contends if he is not exempt for electric and gas that the taxability should start now and not back three years. The Indiana Utility/Communications Sales Tax Exemption Certificate, Form ST-109, clearly states on the certificate that "this certificate is subject to review by the Department of Revenue".

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DISCUSSION

The doctrine of res judicata has limited application to an administrative tax proceeding. See AM JUR2D, Administrative Law, Sections 496, 503. It does not apply to assessments involving different time periods. Id. at Section 504. Thus, the Department's failure to assess use tax on utilities in a prior audit does not bar an assessment for this item in a subsequent audit involving a different time period.

The Department does not find taxpayer's argument favorable for prospective treatment because the Indiana Utility/Communications Sales Tax Exemption Certificate, Form ST-109, clearly states that "this certificate is subject to review by the Department of Revenue".

FINDING

Taxpayer's protest is denied.